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Title Examinations, When Is Action on the Security Instrument Barred

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TITLE EXAMINATIONS, WHEN IS ACTION ON THE SECURITY INSTRUMENT BARRED

*John W. Fisher, II**

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I. INTRODUCTION

As lawyers who are involved in real estate transactions know, the typical loan involves two separate legal instruments: the “promissory note” and a security document, typically, a deed of trust in West Virginia. Each of these instruments has its own purpose or function in the transaction as is well illustrated by the recent case *Arnold v. Palmer*.¹ While the distinction between being personally liable, i.e., responsible for the payment of the promissory note,

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¹ 686 S.E.2d 725 (W. Va. 2009). In *Arnold*, Mr. Arnold executed a promissory note in the original amount of \$128,000. Mrs. Arnold was not a signatory on the note. The security for the note was property that Mr. and Mrs. Arnold owned as joint tenants with the right of survivorship. Both Mr. and Mrs. Arnold signed the deed of trust securing the payment of the promissory note. Mr. Arnold died, and following his death, payments on the note became in default. Under the survivorship provision of the deed, Mrs. Arnold as sole owner of the real property sought to enjoin the lender from selling the security under the deed of trust to pay the balance of the promissory note. On appeal, the court held that since Mrs. Arnold had not signed the promissory note she was not personally liable on it, but since she had signed the deed of trust the bank was entitled to “foreclose” on the security and use the proceeds to pay the note.

and having property in which one has an ownership interest serve as surety for a debt obligation is perhaps the most important difference in the purpose of these two documents to the parties to the transaction, the title lawyer also recognizes the problems created by each of these documents having separate statutes of limitations. The goal of this article will be to examine whether the West Virginia Legislature was more successful in addressing this issue in the late 1990s than the efforts of earlier legislatures beginning in the early 1920s.

A good place to begin the discussion is with the definitions of each document provided in the *Arnold* case:

A promissory note is known as a negotiable instrument, enforcement of which is governed by the Uniform Commercial Code. Such enforcement is illustrated by W.Va. Code § 46-3-401 (1993) (Repl. Vol. 2007), which states in relevant part that “(a) A person is not liable on an instrument unless (i) the person signed the instrument or (ii) the person is represented by an agent or representative who signed the instrument and the signature is binding on the represented person under section 3-402 [§ 46-3-402].”²

The statute of limitations for a negotiable instrument is found in West Virginia Code, section 46-3-118 and for present purposes will be considered as six years from the due date or for a demand note six years from the demand.³

² *Id.* at 732.

³ W. VA. CODE ANN § 46-3-118 (LexisNexis 2007). Statute of Limitations.

(a) Except as provided in subsection (e), an action to enforce the obligation of a party to pay a note payable at a definite time must be commenced within six years after the due date or dates stated in the note or, if a due date is accelerated, within six years after the accelerated due date.

(b) Except as provided in subsection (d) or (e), if demand for payment is made to the maker of a note payable on demand, an action to enforce the obligation of a party to pay the note must be commenced within six years after the demand. If no demand for payment is made to the maker, an action to enforce the note is barred if neither principal nor interest on the note has been paid for a continuous period of ten years.

(c) Except as provided in subsection (d), an action to enforce the obligation of a party to an unaccepted draft to pay the draft must be commenced within three years after dishonor of the draft or ten years after the date of the draft, whichever period expires first.

(d) An action to enforce the obligation of the acceptor of a certified check or the issuer of a teller's check, cashier's check, or traveler's check must be commenced within three years after demand for payment is made to the acceptor or issuer, as the case be.

(e) An action to enforce the obligation of a party to a certificate of deposit to pay the instrument must be commenced within six years after demand for payment is made to the maker, but if the instrument states a due date and the

In the *Arnold* case, the court explained the purpose of the deed of trust as follows:

[A] “deed of trust” is a deed that conveys title to real property in trust as security until the grantor repays the loan. In the case of default of a debt secured by a deed of trust, the property becomes liable to sale under the power of sale conferred upon the trustee. Further, in view of the foregoing, we hold that a lending institution may require the trustee of a valid deed of trust to initiate foreclosure proceedings on the property subject to the deed of trust, even though one of the signatories to the deed of trust did not sign the underlying promissory note.⁴

maker is not required to pay before that date, the six-year period begins when a demand for payment is in effect and the due date has passed.

(f) An action to enforce the obligation of a party to pay an accepted draft, other than a certified check, must be commenced (i) within six years after the due date or dates stated in the draft or acceptance if the obligation of the acceptor is payable at a definite time or (ii) within six years after the date of the acceptance if the obligation of the acceptor is payable on demand.

(g) Unless governed by other law regarding claims for indemnity or contribution, an action (i) for conversion of an instrument, for money had and received, or like action based on conversion, (ii) for breach of warranty or (iii) to enforce an obligation, duty, or right arising under this article and not governed by this section must be commenced within three years after the cause of action accrues.

Id.

⁴ *Arnold*, 686 S.E.2d at 733. Prior to the above quote, the court had quoted three earlier West Virginia decisions as follows:

Significantly, in *Minor v. Pursglove Coal Mining Co.*, 118 W.Va. 170, 176, 189 S.E. 297, 299 (1936), this Court also recognized that “[t]he trust creditor has no estate in, or right of possession to, the trust property by virtue of the deed of trust. He has merely a chose in action secured by the trust, which may be enforced only by sale of the property.” In *Citizens’ National Bank of Connellsville v. Harrison-Doddridge Coal & Coke Co.*, 89 W.Va. 659, 665, 109 S.E. 892, 894 (1921), this Court stated that “[i]n case of default in payment of a debt secured by a deed of trust, no change occurs in the title. The property merely becomes liable to sale under the power of sale conferred upon the trustee.” Stated otherwise,

[a] deed of trust in the nature of a mortgage, is a conveyance in trust by way of security, subject to a condition of defeasance, or redeemable at any time before the sale of the property. A deed conveying land to a trustee as mere collateral security for the payment of a debt when due, and with power to the trustee to sell the land and pay the debt, in case of default on the part of the debtor, is a deed of trust in the nature of a mortgage. *Sandusky v. Faris*, 49 W.Va. 150, 174, 38 S.E. 563, 573 (1901).

Id. at 732–33.

The fact that the “deed of trust” as contrasted to a “mortgage” is the security interest of choice in West Virginia is noted by the court in the *Arnold* case in a footnote in which the court explains:

While the deed of trust, and not the mortgage, is the instrument used in West Virginia to secure the payment of a debt, this Court has stated that “a deed of trust is in effect a mortgage, the primary difference being the manner in which it is foreclosed.” *Firstbank Shinnston v. West Virginia Insurance Co.*, 185 W.Va. 754, 758, 408 S.E.2d 777, 781 (1991) (citing *Rock v. Mathews*, 35 W.Va. 531, 536, 14 S.E. 137, 139 (1891)). See also *Villers v. Wilson*, 172 W.Va. 111, 115 n. 4, 304 S.E.2d 16, 19 n. 4 (1938). In the event there is a default in payment of a debt secured by a deed of trust, the holder thereof need not apply to a court to foreclose it, as the holder of a mortgage would. Instead, the property merely becomes liable to sale under the power of sale conferred upon the trustee. *W.Va. Code*, 38-1-3 [1923]⁵

The statute of limitations of “[a]ny lien reserved by any conveyance of real estate or created by any deed of trust or mortgage on real estate” is found in West Virginia Code section 55-2-5, and it is the history of section 55-2-5 which is the focus of this article. As will be seen, the early attempts to apply this statute retroactively, i.e., to liens before 1921, were held unconstitutional. As discussed below, it is, at best, questionable whether the most recent rewrites of the statute have been more successful in applying the statute to pre-1921 security interest. To solve this problem, it is suggested that a statute based upon the concept of the Marketable Title Acts may succeed where others have failed.

II. BEFORE THERE WAS A SECTION 55-2-5

It can be assumed that the problem of “old” unreleased security interest in land has been a problem ever since it became possible to borrow money and use land as surety for the debt. With the adoption of recording systems for titles to real estate, an innovation of the American legal system,⁶ the problem of unreleased, recorded security interest took on an added dimension, i.e., how to “clear” record title. While the first statute of limitations directed at security interest was not enacted in West Virginia until 1921,⁷ as noted above, the “problem” of unreleased security interest in real estate existed long before the first enactment of section 55-2-5 in 1921. This section will look at the cases in this

⁵ *Id.* at 732, n.10 (citations omitted).

⁶ See John W. Fisher, II, *The Scope of Title Examination in West Virginia: Can Reasonable Minds Differ?*, 98 W. VA. L. REV. 449, 454 (1996).

⁷ 1921 W. Va. Acts 179; *infra* Appendix 1.

field before the initial statute was adopted, which will show the progression of this area of law in West Virginia.

Apparently, the first reported case in West Virginia to deal with this issue was *Edwards v. Chilton*.⁸ The one page opinion discussed the four assigned errors, one paragraph for each. The second ground assigned as error was that Alexander Cobb, a prior owner in the chain of title, had borrowed money in 1841 and had given a deed of trust on September 6th of that year to secure the payment of the debt.⁹ The current law suit, filed in April 1868, presented the issue of whether the 1841 deed of trust was a defect in the title. In holding that the 1841 deed of trust was not a defect in title, the court said:

It was more than twenty years after this deed of trust was executed before the bill was filed by the complainant, and it must be presumed that after such length of time the debt secured by it had been paid, especially as it is not charged in the bill that it is claimed to be unpaid, or that the creditor threatens to cause the land to be sold under the trust.¹⁰

While the *Edwards* case applied a twenty year presumption of payment to decide the case, it provided no discussion of the “rule” applied. The first West Virginia case to provide any discussion or explanation of the passage of time constituting a bar to “foreclosure” under a deed of trust was *Pitzer v. Burns*.¹¹ The facts, in essence, are that Burns executed a deed of trust on his interest in 271 acres of land on September 26, 1845, to secure a debt of \$300 which he owed to Faulkner, as well as debts to several others.¹² Burns was to have until September 26, 1846, to pay the debt to Faulkner and if not paid, then the land could be sold under the deed of trust.¹³ Plaintiffs filed a lawsuit on September 7, 1867, to sell the land under the deed of trust, and the circuit court granted the

⁸ 4 W. Va. 352 (1870).

⁹ *Id.* at 354.

¹⁰ *Id.* at 354–55. Syllabus point 2 by the court expressed its holding as:

Where a period of more than twenty years has elapsed since the executing of a deed of trust upon real estate, before a bill filed by a subsequent vendor deriving title from the party executing the trust, enjoining the collection of purchase money on the ground of defect in a title, it must be presumed that the debt secured by the trust deed has been paid; especially where it is not alleged in the bill that it is claimed to be unpaid or that the creditor threatens to cause the land to be sold under the trust.

Id. at 352.

¹¹ 7 W. Va. 63 (1873).

¹² *Id.* at 64–67.

¹³ *Id.*

plaintiffs' request to sell Burns's interest in the land.¹⁴ Burns appealed the circuit court's opinion.¹⁵

Following a discussion of secondary authorities and cases from other jurisdictions,¹⁶ and after noting "[i]n Virginia and West Virginia a deed of trust such as that in this case, has to a great extent been substituted for the mortgage, and it is regarded as a security for the debt,"¹⁷ the court stated:

From what has preceded it is clear that in Virginia the limitation in equity as against mortgages and trust deeds when the statute of limitations does not govern is twenty years, and that such limitation is based upon presumption of payment and even when more than twenty years has elapsed from the time the right to sue accrued, in some cases, under circumstances, payment will not be presumed. This limitation, acted on by courts of equity in Virginia, is not by analogy to the statute of limitations as applicable to the action of ejectment, or any other real action, but by analogy to the limitation from presumption of payment, in actions at law upon a single bill, if it is not merely a rule of courts of equity. This it seems is but reasonable, for if it were not so, if a single bill were given for a debt secured by a deed of trust, and twenty years were the limitation to an action on the single bill, and fifteen years the limitation to an action of ejectment, the security for the debt would be barred by limitation, before the debt. The suit was commenced prior to the time the Code of this State of 1868 took effect, and was pending at that time, and according to its provisions no part of it, so far as limitations are concerned can effect it, or apply to it.¹⁸

The court noted that under the Virginia Codes of 1849, 1850 and 1860, the statute of limitations was twenty years from July 1, 1850.¹⁹ The applicable statute of limitations in West Virginia at the time the suit was filed was fifteen years.²⁰ The court noted that fourteen years after the date of the deed of trust, Faulkner demanded Burns pay the interest then due, and eight years after that Faulkner again demanded Burns pay the interest.²¹ The court also noted that during the period between April 17, 1861, and March 1, 1865, the statute of limi-

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *See id.* at 69–75.

¹⁷ *Id.* at 74.

¹⁸ *Id.* at 75–76.

¹⁹ *Id.* at 76.

²⁰ *Id.*

²¹ *Id.*

tations was tolled.²² For these reasons, the court held the suit to sell the land was not banned by a lapse of time.²³

The issue of the presumption of payment of a “note” was again before the court in *Hale v. Anderson Pack’s Executor*.²⁴ Neither a deed of trust nor any other form of a security document for land was involved in the *Hale* case, and while the facts are more complex, for present purposes, the issue was whether a suit filed in 1867 on a demand note, dated April 18, 1843, was barred by the passage of time, i.e., the passage of twenty years.²⁵ The court noted that in Virginia, prior to 1849 there was no statute of limitations to sue on bonds given before that date.²⁶ In 1849, Virginia enacted a provision which provided a twenty year statute of limitation that would start to run on existing bonds on July 1, 1850.²⁷ The court rejected the argument that with the passage of the statute, the presumption of payment with the lapse of time could no longer arise.²⁸

The court’s explanation of the presumption of payment is the important aspect of this case in regards to this Article. As to that presumption, the court said:

The presumption of payment is not a legal presumption absolutely conclusive, but it is a presumption of fact, which, though not conclusive, is yet *prima facie* proof of payment. If less than twenty years, though nearly that time, have elapsed, all the circumstances are considered, including lapse of time, and their natural weight as evidence is to be given to each circumstance, including lapse of time, but if twenty years has elapsed a legal presumption arises, which must be accepted as proof, unless the contrary appears by evidence. But this presumption may be rebutted by proof which is satisfactory that the debt has not been paid, such as the proof of payment of interest within the twenty years, the continued absence from the country of the obligee,

²² *Id.*

²³ *Id.* at 78.

²⁴ 10 W. Va. 145 (1877).

²⁵ *Id.* at 147.

²⁶ *Id.* at 149.

²⁷ *Id.* at 149. In the words of the court:

Prior to the code of Virginia of 1849, there was no limitation to a suit on the bonds given to him dated April 18, 1843. By that Code, ch. 149, §5 and 19, this bond, then due and on which no suit had been brought, would not become barred till twenty years after July 1st, 1850. That is till July, 1st 1870, even had no war intervened.

Id.

²⁸ *Id.* at 150 (“The presumption of payment from lapse of time is, I conceive, in no manner effected by the passage of an act of limitation to suits upon bonds. This conclusion is consonant to reason and supported by the English authorities.”).

the continued insolvency of the defendant or obligor, or other strong circumstances showing non-payment, or showing good causes for longer forbearance.²⁹

On the facts before it the *Hale* court held:

Abating therefore such reasonable time after the bond was given before, according to the understanding of the parties, it was to be paid, and also the time during which the war was pending, and the time during which presumption of payment could arise in the case, would be much less than twenty years. And the circuit court therefore did not err in refusing to sustain the exception to the allowance of this debt to John H. Vawter.³⁰

The issue of whether the passage of time would bar action on a deed of trust issue was again before the court in *Camden v. Alkire*.³¹ The facts of the case are not complicated and, therefore, clearly present the issue. Alkire borrowed \$766.80 from Camden on February 4, 1858, payable one year thereafter and at the same time executed a deed of trust on 135 acres to secure the payment of the debt.³² The deed of trust was recorded on February 4, 1858.³³ On July 5, 1858, Alkire sold the 135 acres to Butcher and as part of the consideration for the conveyance, Butcher agreed to be personally liable to pay off the debt to Camden.³⁴ In 1866, Butcher contracted to convey the land to Brown and in 1867 Brown went into possession of the land and had been in possession since.³⁵ Although Brown paid the purchase price to Butcher soon after the contract was entered into, a deed for the land was not delivered until August 25, 1873.³⁶

Pursuant to his agreement with Alkire, Butcher paid Camden \$996.61 on May 4, 1869.³⁷ On June 26, 1877, the administratrix of Camden sued Alkire for the balance of the debt and secured a judgment for \$474.04.³⁸ In August 1877, Butcher died insolvent.³⁹ The current suit sought to sell the 135 acres under the deed of trust given by Alkire on February 4, 1858.⁴⁰ The circuit court

²⁹ *Id.* at 151–52.

³⁰ *Id.* at 154.

³¹ 24 W. Va. 674 (1884).

³² *Id.* at 675–76.

³³ *Id.*

³⁴ *Id.* at 676.

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.* at 677.

dismissed the suit holding that the right to subject the land to the payment of the debt was barred by the statute of limitations.⁴¹ From this ruling, Camden, the plaintiff, appealed.⁴²

On appeal, the court stated the issue as, “The only question presented for our decision is, whether or not the plaintiff’s right to relief against the said one hundred and thirty-five acres of land is barred by the statute of limitations on the lapse of time?”⁴³

The court began its answer to this question by explaining:

The right to enforce the lien of a mortgage or trust-deed being equitable and not a legal remedy, the statute of limitation has no direct operation upon such right, but the general rule adopted by courts of equity in regard to the redemption or enforcement of mortgages is by analogy to the right of entry at law, under the old statute of limitations, 21 Jac.1, c.16, that twenty years’ possession by the mortgagor or mortgagee without any account or acknowledgment of a subsisting mortgage is a bar, unless the party who invokes the aid of the Court is within some of the exception made for disabilities.”⁴⁴

The court noted that in some states where the statute of limitations for bringing a right of entry had been changed from twenty years, by analogy those courts had changed the period of time for the presumption of payment to arise to the same period as set forth in the statute barring the suit for a right of way of entry.⁴⁵

As to the West Virginia position on the length of time, the court stated:

But in Virginia and this State this rule is not followed, and the period of twenty years has been adhered to, notwithstanding the time fixed by the statute for the entry on land is limited to less than twenty years. The rule in these States and, perhaps others, seems to be, that such lapse of time affords evidence of a presumption that the mortgagor has abandoned his right, or, in case of a trust-deed, that the debt secured has been paid.⁴⁶

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.* at 677–78.

⁴⁶ *Id.* at 678 (citations omitted).

In order for the lapse of time to constitute a bar, the possession by the mortgagee must be unequivocally adverse to the person entitled to the equity of redemption.⁴⁷

Also, if the person entitled to enforce the right is under a disability, the period under the disability is not counted.⁴⁸

The rule, as articulated in *Camden v. Alkire* is stated by the court as:

The presumption of payment which arises from the non-enforcement of a mortgage is not adopted as a fixed and positive limitation, but as an equitable rule and by an analogy to the old statute of limitations of 21 Jac. 1, c.16. It may, therefore, require a longer or shorter period to effect a bar. Twenty years is an absolute bar in the absence of any evidence or circumstances affecting the legal presumption of such bar. A payment of interest or part of the principal renews the mortgage, so that a suit may be brought to enforce it within twenty years after such payment. This is a rule universally recognized. And where there are several persons interested in the equity of redemption, such

⁴⁷ *Id.*

The possession of the mortgagee must be unequivocally adverse to the person entitled to the equity of redemption. But the fact that he entered with the consent of the owner does not prevent his possession from being adverse, unless in return he assumed some obligation to the owner. The supposed relation of the mortgagor to the mortgagee, as his tenant is not allowed to operate against the presumption of payment arising from the mortgagor's continued possession. After twenty years this presumption may be made even in chancery. The lapse of twenty years, without the payment of interest, or demand made, the mortgagor being in possession, will raise the presumption that the debt has been paid, but this presumption may be repelled by evidence of the relation and circumstances of the parties.

Id. (citations omitted).

⁴⁸ *Id.* "If the person seeking to enforce the right was under disability, the time of his disability is to be deducted, though he cannot avail himself of successive disabilities." *Id.* As part of this discussion, the court also noted:

When, however, by the terms of the mortgage, or by subsequent agreement, the mortgagee is to take and hold possession, until he shall satisfy his claim from the rents, his possession does not become adverse until his demand has been satisfied from this course, or he asserts an absolute title in himself and gives distinct notice of it to the mortgagor.

The mortgagee's acknowledgment is binding upon all who hold under him as lessee's or otherwise. By commencing proceedings to foreclose the mortgage either by action or by advertisement, the mortgagee recognizes it as a subsisting lien and the mortgagor may there-after within twenty years redeem. A verbal acknowledgment that the mortgage is a subsisting security is sufficient to prevent the possession from operating as a bar if the evidence be clear and unequivocal.

Id. at 678–79 (citations omitted).

payment by any one of them keeps alive the right not only against him, but also against all the other owners of the equity of redemption. A purchaser assuming the payment of a mortgage recognizes it as a subsisting incumbrance, and cannot set up the lapse of time as a bar against it until twenty years from that time have elapsed. His grantee is also bound by such admission to the same extent that he was himself bound.⁴⁹

The court recognized that the debt and the security have two distinct legal bases in stating:

Though the debt be barred the lien may be enforced. The fact that a debt secured by a mortgage is barred by the statute of limitations does not as a general rule extinguish the mortgage security or prevent the enforcement of it by suit.

In equity a mortgage is always regarded merely as a security for the debt. The debt is the principal thing; an assignment of it carries with it the mortgage; and, therefore, so long as a recovery on the note or bond given for the debt is not barred, the right to enforce the lien of it created by the mortgage or trust-deed on the land continues and may be enforced by suit in equity. If by non-residence of the mortgagor time be deducted from the period of limitation, so that an action on the debt is not barred, neither is a suit to foreclose the mortgage barred.⁵⁰

The court also recognized that the law applicable to mortgages is equally applicable to deeds of trust.⁵¹

⁴⁹ *Id.* at 679 (citations omitted).

⁵⁰ *Id.* at 680 (citations omitted).

⁵¹ *Id.* at 680–81 (citations omitted).

The foregoing principles in regard to mortgages apply equally to trust-deeds. A trust-deed to secure a debt is in legal effect a mortgage. It is a conveyance made to a person other than the creditor with a power of sale if the debt is not paid as agreed. Such a deed has all the essentials of a mortgage; it is a conveyance of land as a security for a debt. It passes the legal title to the grantee just as a mortgage does. Both instruments convey a defeasible title only; and the right to redeem is the same under either. The only important difference between them is, that in the one case the conveyance is directly to the creditor, while in the other it is to a third person for his benefit. So far as they bear upon the case before us, all the incidents and legal principles as to the effect of a mortgage apply with equal force to a trust-deed. Each is a form of security and in practice in Virginia and in this State the latter has almost entirely superseded the former. In the large majority of the other States of the Union mortgages are used almost exclusively; and thus it is that the doctrines relating to this kind of securities are by text-writers and courts generally classified and

In applying its rule to the facts before it, the court noted that since only nineteen years had passed between the due date of the debt and the filing of the lawsuit, and only eleven years had passed since Butcher's payment on the debt, enforcement of the lien to sell the land was not barred.⁵²

The problem, in a practical sense, of applying the presumption of payment as the "solution" to old, unreleased deeds of trust is illustrated by *Criss v. Criss*.⁵³ The litigation in *Criss* arose within the contexts of a petition of the lands of Michael Criss among his heirs. Mary V. Criss, the plaintiff, sought the partition of the real estate in kind, and if that was not feasible, then to sell the property and divide the proceeds.⁵⁴ The court determined the property could not be partitioned in kind and ordered it sold.⁵⁵ Mary V. Criss became the purchaser at this sale.⁵⁶ The litigation arose as to the distribution of the proceeds of the partition sale.⁵⁷

Among the defendants in the partition case were brothers Aaron Criss and Andrew S. Criss, heirs of Michael Criss.⁵⁸ At an earlier time, i.e., on September 22, 1845, Andrew gave to Aaron his note, payable in one year, in the

explained as mortgages; but, as before stated, the principles and rules governing mortgages are essentially the same and apply equally to trust-deeds executed to secure debts.

Id. (citations omitted).

⁵² *Id.* at 681.

In the light of the foregoing doctrines it is apparent that the right of the plaintiff to enforce the trust-deed in the case at bar against the trust-property in the possession of the defendant, Brown, was not barred at the time this suit was commenced. It is not pretended that the debt was barred by the statute of limitations. The bond for the debt became due in February, 1859, and the action at law having been instituted on it in June, 1877, less than nineteen years after its maturity, the time sufficient to raise the presumption of payment had not then elapsed. And, moreover, in May, 1869, only eleven years before this suit was commenced, Butcher, the vendee of Alkire, the grantor in the trust-deed, who had assumed to pay off this debt, paid on it the sum of nine hundred and ninety-six dollars and sixty-one cents. This payment was a recognition not only of the debt, but likewise of the existence of the trust-deed on the land; and, consequently, there could arise no presumption of payment from the lapse of time until twenty years had expired after that date. And Butcher, being also the vendor of the defendant Brown, the latter can stand in no better position than Butcher as to gaining title by possession and the lapse of time to the land conveyed by the trust-deed which was duly recorded before his purchase.

Id.

⁵³ 28 W. Va. 388 (1886).

⁵⁴ *Id.* at 389.

⁵⁵ *Id.*

⁵⁶ *Id.* at 390.

⁵⁷ *Id.* at 394.

⁵⁸ *Id.*

amount of \$470.88, secured by a deed of trust of the same date.⁵⁹ Within the suit for partition, Aaron Criss filed a separate answer in which he sought any proceeds of the sale that Andrew Criss might have been entitled to as payment on the unpaid note of September 22, 1845.⁶⁰ Andrew filed an answer in which:

[H]e utterly denies that he is indebted to said Aaron one cent on said trust, [and further that] such cause of action accrued above twenty years before the filing of the answer of the said Aaron, or before the institution of this suit, nor has this defendant at any time since the making of said trust, or within twenty years before the institution of this suit, or at time before the filing of said Aaron's answer therein, promised and agreed to pay said debt.⁶¹

Although the answers of Aaron and Andrew were not the correct procedural manner to raise the issue of this debt, the circuit court's decree, rendered in January 17, 1877, provided:

And it is here agreed by the said Aaron and Andrew S., by their counsel, that the answer of said Aaron Criss shall be treated as a cross bill as to the matters contained therein, and the answer of said Andrew S. as an answer to said answer, treated as a cross bill, and that the matters contained in said answer shall be heard as if upon cross bill, answer thereto and general replication thereto.⁶²

The court noted "the only question substantially in this cause to be decided by us is, whether the court of equity in 1876 should have permitted Aaron Criss to enforce by sale a deed of trust dated and duly recorded September 22, 1845, given by his brother Andrew S. Criss"⁶³

⁵⁹ *Id.* at 395.

⁶⁰ *Id.*

⁶¹ *Id.* at 391–92.

⁶² *Id.* at 393.

⁶³ *Id.* at 394. Later in the opinion, the court explained that what Aaron really sought was:

This answer of Aaron Criss thus treated as a cross-bill simply sets up, that his brother, Andrew S. Criss, owed him a note executed on a settlement of accounts, which note was payable nearly thirty years before the filing of this cross-bill, but no part of which had been paid; that this note was secured by a deed of trust on the real estate, which the Court in this cause had caused to be sold, and the proceeds of which sale in fact belonged to Andrew S. Criss and ought to be applied, so far as his interest in these proceeds went, to the payment of this debt, and asks that the Court decree, that Andrew S. Criss's portion of the proceeds of said sale be so applied.

Id. at 409.

The court recognized the basic legal principal involved, which is the crux of the issue, as follows:

In the case before us no action would lie for the recovery at law on the note after September 22, 1851; for by the statute of limitations then in force five years would bar such action. But it is well settled both in Virginia and in this State, that the specific lien created by said deed trust did not become extinguished then, nor was the equitable remedy for its enforcement then taken away, simply because the remedy by suit on the note became barred by the statute of limitations; for the doctrine in this State as well as in most of the other States of the Union is, that the statute of limitations bars the *remedy* but does not extinguish the debt, and therefore if the debt be secured by a deed of trust, though an action for its recovery be barred, the lien of the deed of trust or mortgage or other lien such as the vendor's lien continues and is not affected by any lapse of time short of the period sufficient to raise the presumption of payment.⁶⁴

The court noted that in some states, the time period when actions on a mortgage or deed of trust would be barred after the limitation of the right of entry on the land had expired, even though that time period may be different, either more or less, than the time in which the debt would be paid, if it had not been secured by a deed of trust or mortgage.

“But in other States and in Virginia and in this State this rule is not followed; and the presumption of the payment of a debt is in all cases the same, whether the debt be or be not secured by a deed of trust or mortgage, or whether it be evidenced by a bond. [sic] notes or judgment. And such lien may be enforced in a court of equity, till such presumption arise, though the debt be barred at law by the statute of limitations, or though the right of entry on the land, on which the debt is a lien, be also barred at law by the statute of limitations. The Virginia and West Virginia decisions are sustained by the weight of authority in other States.”⁶⁵

After noting that the presumption of payment after twenty years was recognized in England,⁶⁶ and had been applied in Virginia since 1791,⁶⁷ the court noted that while the statute of limitations may bar the action on the note,

⁶⁴ *Id.* at 396.

⁶⁵ *Id.* at 398.

⁶⁶ The court explained:

[t]he statute of limitations does not bar either the enforcement of the mortgage and the collection of the debt in that manner or the right of the mortgager to redeem, these being proceedings in a court of equity to enforce rights, to which no limitation was fixed by any statute of limitations, and because the twenty years fixed on by the courts as raising a presumption either of the payment of the debt or of the abandonment of the right to redeem does not like a statute of limitations produce an absolute bar but raises a presumption, which may be rebutted by certain circumstances, which, a court of equity holds, justify the exten-

It will be observed, that in these cases, wherever any time is named as sufficient to raise the presumption of the payment of a debt, twenty years is constantly the time named. In truth this period has long been fixed upon by the courts as the proper time, in which this presumption of payment as well as many other presumptions are raised. Thus in *Rex v. Joliffe*, 2 B. & C. 54 (9 Eng. Com. L. R.) Lord Tenterden said: "A regular usage for twenty years not explained or contradicted is that, upon which many private and public rights are held, there being nothing in the usage to contravene the public policy." In that case a title to an office by presumption was considered as established, when the custom was proven to have existed for twenty years, there being no evidence to contradict the existence of such custom at any time, it being presumed, that such custom had existed from time immemorial from this uncontradicted proof of its existence for the last twenty years It has in like manner been long settled, that, when the payment of a debt though evidenced by a bond or other specialty was not demanded for twenty years, and there was no payment of interest or other circumstances to show that the debt was still in existence and force, payment of such debt or release of such specialty ought to be presumed by a jury (*Oswald v. Leight*, 17 Tenn. 271). Lord Ellenborough in *Colsell v. Budd*, 1 Camp 27, thus lays down the law: "After the lapse of twenty years a bond will be presumed to be satisfied; but there must be either a lapse of twenty years or a less time coupled with some circumstances to strengthen the presumption."

Id. at 400.

⁶⁷ In the words of the court:

[t]he decisions, which have been rendered in Virginia and West Virginia conclusively settle the law in this State to be as we have stated it above. The law was in fact so settled in Virginia in a case decided in 1791, one of the oldest cases reported in The Virginia Reports. *Ross v. Norvell*, 1 Wash. 14 that the limitation of twenty years, after which generally a court of equity would not permit the mortgager to redeem lands, which had been in the possession of the mortgagee, was fixed by the courts, not because after twenty years the right of entry was taken away and an action of ejectment barred by the statute of limitations, but because after twenty years a debt, no matter how evidenced whether by note, bond or judgment, was presumed to be paid, and so after the lapse of twenty years the right to redeem the land ought to be presumed to have been abandoned by the mortgager, when the mortgagee was in possession.

Id. at 398–99.

sion of the time, within which such equitable rights may be enforced.⁶⁸

The court provided, as examples of what would extend the time period, payment of interest or of part of the principal within the twenty year period or the fact the creditor could not sue during a portion of the time, i.e., during the war between the states.

The court in reviewing the record before it, reasoned that the presumption of payment was very strong⁶⁹ and concluded:

⁶⁸ *Id.* at 399. The court discussed the nature of the presumptions raised by the passage of twenty years:

We will now consider the nature of these presumptions and especially of this presumption of the payment of a debt after the lapse of twenty years. As stated in the third point of the syllabus in *Camden v. Alkire*, 24 W. Va. 675, this presumption is but an equitable rule, and it may be varied and made to operate at a longer or shorter period depending upon circumstances and the relation of the parties. But as I understand, though there be a discretion in a particular case, whether this period of twenty years shall be lengthened or shortened to the particular circumstances of the case, yet this discretion is not arbitrary but must be governed by what has been held under the same or like circumstances in the decided cases. Thus if the interest on the debt is paid or a part of the principal is paid within the last twenty years, that fact will effectually repel the presumption of payment after a lapse of more than twenty years since the debt became due (See *Emory v. Keighan*, 88 Ill. 482; *Rodham v. Morley*, 1 DeG. & J. 1; *Harrington v. Slade*, 22 Barb. 161; *Schmucker v. Sibert*, 18 Kan. 104). In calculating, whether the twenty years had elapsed necessary to raise the presumption of payment, it is settled, that, if during a portion of the time for any reason an action could not have been brought to enforce this debt, this time must not be counted; for no presumption of payment would properly arise during the time, however long it might continue, in which the creditor could not sue upon his debt by reason of the country, in which he lived, being at war with the country, in which the debtor resided, or by reason of the closing of the courts from the existence of war or for any other reason. Such time is abated even when the question is, whether an action is barred by the statute of limitations, and of course it must in justice be abated, when the question is, whether a debt is to be presumed to be paid because of the lapse of time, since it was due and payable (*Hale v. Pack*, 10 W. Va., point 3 of syll. p. 145; *Jackson v. Pierce*, 10 Johns. 413.).

Id. at 402–03.

⁶⁹ *Id.* at 406–07. The court explained:

There being then no circumstances disclosed by this record, which even tend to rebut the presumption of the payment of this note, which is produced by the lapse of thirty years, and which, as the time greatly exceeds the time, in which such presumption arises, that is, twenty years, this presumption is in this case a strong presumption. Under the circumstances disclosed the presumption of payment in this case is so strong, that the proof, that the debt has not been paid, ought to be free from all reasonable doubt, and in its character entirely satisfactory. What is the proof? Nothing whatever but the positive statement by the payee in his deposition “that not one dollar of this debt has ever been paid.” The payee under our statute was a competent witness. And I am dis-

I am therefore of the opinion, that the strong presumption, that this note was paid, arising from the lapse of thirty years without any proof to show, why it had not been before enforced, is rather confirmed than rebutted by the circumstances in this case, and that such presumption has not been overthrown by the testimony of the payee, wherein he simply denies, that a dollar of this debt has been paid, but states no reasons, why he has not collected it, and why he has failed to demand its payment by taking legal steps sooner, and does not pretend to state any circumstances surrounding the case, which would induce the belief, that he could not have forgotten important facts after such a great lapse of time.⁷⁰

The court's summary of its holding is helpful in understanding the somewhat convoluted opinion in the case created, in part, by the unusual method in which the case evolved. The court said:

We think that under the consent agreement in reference to the pleadings contained in this decree the court did not err in considering, that the question fairly submitted to it for decision by the consent of parties was, whether this deed of trust was *then* a lien on the interest of Andrew S. Criss in his father's real estate; but for the reasons heretofore given we think, the court below decided this issue wrong, because the debt secured by this deed of trust should under the circumstances developed in the cause have been presumed to be paid, and this deed of trust thereby discharged and no longer a lien upon the interests of Andrew S. Criss in the real estate, which descended to him from his father, or on the proceeds of such real estate; and that the court erred in directing these proceeds or any part thereof of this real estate,

posed to give to his evidence because of the manner, in which he has testified, all the weight, which I could give it, were he a disinterested witness instead of being, as he is, an interested witness. His deposition was however given more than thirty years after this note had been given to him, and nearly thirty years after it became due. And though he testifies positively, that not "one dollar of this note has ever been paid," yet after such a lapse of time this positive statement can carry with it no more weight than if he had said: "I have no recollection of ever having been paid a dollar on this note; and I do not believe I ever was." But may it not well be, that the whole of this note has been paid off a quarter of a century before, and he still has not the least recollection of such payment? May not these brothers have well had numerous business transactions together after this note became due? Is there anything in the record to indicate, that they did not? Not a word. On the contrary it would seem to be most probable, that they did have these business transactions together.

Id.

⁷⁰ *Id.* at 408–09.

which was under the control of the court, and which belonged to Andrew S. Criss, to be paid to Aaron Criss on this debt or deed of trust. From what we have said it is obvious, that Andrew S. Criss, when he filed his answer misapprehended his legal rights, and that the claim set up against him was not barred by the statute of limitations, as he supposed, and as his counsel in his argument before this Court still insists. It is also obvious, that the said Andrew S. Criss did originally owe this debt secured by this deed of trust; and though a sort of denial, that this debt was originally a valid debt, appears in the answer, yet this *quasi* denial was made obviously from a misapprehension of his legal rights by Andrew S. Criss, when he filed his answer, and that in point of fact he did not dispute the original validity of this debt or deed of trust, and accordingly he did not testify as to the original validity or invalidity of this debt, nor did he introduce any evidence, which tended to show, that this debt was originally invalid. It would have taken exceedingly strong evidence to induce any court to decide, that a deed of trust and note were originally invalid, when no allegation of the kind had been made by the maker of such note and deed of trust for more than thirty years, after they were admittedly executed.

But, as we have said, the original validity of this debt and deed of trust was not the matter intended by the parties to be submitted to the court for decision. It was, whether the debt and deed of trust were *still* valid and could be enforced. The proper way of raising this issue was, when the cross-bill was filed, simply to plead payment, or to simply assert in the answer, that the debt had been paid in full, and that this was sufficiently shown by the lapse of nearly thirty years since the debt became due. But though much confusion has been produced by this answer of Andrew S. Criss being so imperfect, still for the reasons, we have given, I do not think, that the court erred in considering the real question at issue upon its merits, though it did err in the conclusion, which it reached on the merits of the case.

I am therefore of the opinion, that the circuit court of Harrison county erred in the decree appealed from, and that this decree must be reversed, set aside and annulled; and that this cause be remanded to the circuit court of Harrison county with instructions to proceed with this cause and to have distributed the proceeds of the real estate sold in this cause, just as though this deed of trust of September 2, 1845, had never been given, this

Court being of opinion, that it satisfactory appears, that the debt securely by this deed of trust has been paid in full.⁷¹

In summary, the law as it had evolved over the first half century of statehood recognized that even though an action on a note was barred by the statute of limitations on the note, which did not preclude an action to “foreclose” under a security interest securing the note, i.e., a vendor’s lien, mortgage, or deed of trust. Although there was no statute of limitations, per se, on the security interest, action on the security interest could be barred by a presumption of payment. The presumption of payment generally arose after twenty years, but the facts in a particular case could alter that period of time. A deviation from the twenty year period should not be arbitrary, but should be based on precedent. Therefore, given the fact that a determination of whether the presumption of payment applied was fact specific, litigation would usually be necessary to determine if there could be enforcement of the security interest. Given the fact specific nature of the rebuttable presumption rule, it is not surprising that the legislature decided to address the issue of old, unreleased security interest in land by enacting a statutory bar.

III. THE LEGISLATURE TAKES ACTION

On April 27, 1921, the West Virginia Legislature adopted, effective ninety days from its passage, its first statute of limitations on security interest in land which essentially provided a twenty year period from the due date.⁷²

It is fair to assume that the twenty year time period selected for the statute of limitations was based upon the twenty year period creating the presumption of payment that the court had been applying. On first reading, the adoption of the 1921 Act appeared to be little more than a codification of the “common law” rule with the salutary advantage of no longer needing a factual determination that the presumption of payment was applicable to a specific set of facts.

However, a 1933 decision by the Supreme Court of Appeals of West Virginia⁷³ foreshadowed a problem for the 1921 Act. In 1933, the Legislature enacted a statute related to “foreclosures,” undoubtedly in response to the economic problems of the Great Depression, which required the circuit to confirm the sale, including the sale price.⁷⁴

⁷¹ *Id.* at 411–12.

⁷² *See infra* Appendix 1.

⁷³ *Staud v. Sill*, 171 S.E. 428 (W. Va. 1933).

⁷⁴ 1933 W. Va. Acts 101, amending W. VA. CODE § 38-1-8 (1931). The Act of March 11, 1933 of the Acts of the Legislature of 1933 provided:

That section eight, article one, chapter thirty-eight of the code of West Virginia, one thousand nine hundred thirty-one, be and the same hereby amended and reenacted to read as follows:

The trial court held the 1933 Act unconstitutional as it related to its application of a deed of trust entered into on January 1, 1927.⁷⁵ On appeal the Supreme Court of Appeals of West Virginia explained the trial court's ruling did not go far enough. In speaking of the trial court's ruling, the Supreme Court of Appeals of West Virginiasaid:

But a much more serious question confronts us upon the consideration of chapter 34 of the Acts of the Legislature of 1933. That question is: Is not this act unconstitutional in its entirety because it attempts to require circuit courts to exercise a function nonjudicial in its nature, and therefore not within the powers of those courts as defined by the Constitution?⁷⁶

Section 8. When a sale of property is made under any trust deed, otherwise than under a decree, the trustee shall promptly thereafter file his petition with his written report of sale to the circuit court of the county in which such sale shall have been made, or the judge thereof in vacation, praying for a confirmation of such sale, and in case the court or judge shall be satisfied that said sale was in all respects regular and that the sale price reported is reasonably adequate under all the circumstances, he shall confirm such sale; otherwise the court or judge shall have discretion to direct a resale or resales, under such terms or conditions as may be deemed just, to the end that a reasonably adequate price shall be obtained, and in determining all questions in respect to adequacy of price, the court or judge may consider the appraisement of the property, and as well affidavits filed pro and con and all evidence taken upon the inquiry. The trustee shall make no conveyance or transfer title to the property, until directed to do so by the court or judge; *Provided, however,* That in the case of real property, the provisions of article thirteen of this chapter shall be followed. All decrees and orders entered in respect to such report of sale shall be entered upon the chancery order book and properly indexed in the name of the grantor in said trust deed, with the addition of the words "trust deed". The taxable cost of such proceeding shall be only that prescribed by law for filing reports and entering orders and decrees, and shall be payable as other costs of executing the trust. Such report may be made and filed in the vacation of the court, but in such case the trustee shall by public proclamation at the time of sale give notice of the time and place at which the report will be so made.

Id.

⁷⁵ *Staud*, 171 S.E. at 428.

⁷⁶ *Id.* at 430. The court continues by summarizing the constitutional provisions stating:

Article 8 of the Constitution deals with the judiciary. Section 1 of that article vests the judicial power of the state in the Supreme Court of Appeals, in the circuit courts and the judges thereof, and in such inferior tribunals as are therein authorized and in justices of the peace. Section 3 of that article defines the jurisdiction of the Supreme Court of Appeals and section 12 that of the circuit courts. Section 12 reads as follows: "The circuit court shall have the supervision and control of all proceedings before justices and other inferior tribunals, by mandamus, prohibition and certiorari. They shall, except in cases confined exclusively by this constitution to some other tribunal, have original

The court concluded its discussion on the constitutionality of the statute stating:

We think there can be no question but that this chapter does not set up a proceeding which may be described as judicial in any sense. The courts cannot, under our Constitution, be vested with original authority and jurisdiction over nonjudicial matters. This is the general, though not universal, state of the law throughout the country. On the grounds stated, therefore, we hold that the Act of March 11, 1933, chapter 34 of the Acts of the Legislature of 1933, is unconstitutional and void in its entirety.⁷⁷

It is the court's discussion of the trial court's holding that the statute could not be applied to a deed of trust entered into before the effective date of the statute that is important. On that issue, after noting that it had not found any cases "closely analogous," the court said the following:

and general jurisdiction of all matters at law where the amount in controversy, exclusive of interest, exceeds fifty dollars; of all cases of habeas corpus, mandamus, quo warranto, and prohibition; and of all cases in equity, and of all crimes and misdemeanors. They shall have appellate jurisdiction in all cases, civil and criminal, where an appeal, writ of error or supersedes may be allowed to the judgment or proceedings of any inferior tribunal. They shall also have such other jurisdiction, whether supervisory, original, appellate, or concurrent, as is or may be prescribed by law."

A close reading of section 12 shows no place within the defined powers and jurisdiction of circuit courts that the powers attempted to be conferred by chapter 34 of the Acts of 1933 could lodge unless it be in the last sentence thereof; and, still more restrictively, in that part of the sentence which relates to "supervisory" jurisdiction. Certainly the word as used here is not intended to give to circuit courts such supervisory jurisdiction as may be prescribed by law over everything and anything that may be referred to them by the Legislature. It is obvious that the word as here used is not to be taken in its most comprehensive meaning. When we seek a proper restricted sense in which the word is here used, we can find it only by saying that the supervisory jurisdiction of the circuit courts as conferred upon them by law is confined to supervision over matters judicial. This is especially true in view of the fact that section 12 of article 8 must be read in connection with section 3 of that article, defining the powers of the Supreme Court of Appeals. *State v. Kyle*, 8 W. Va. 711. And so Judge Hatcher said in *Hodges v. Public Service Commission*, 110 W. Va. 649, at page 654, 159 S. E. 834, 836: "We adopt the natural inference that the 'other jurisdiction' is jurisdiction essentially juridical (then or thereafter prescribed by law) over proceedings not named in the section." So that, if the proceeding provided for in chapter 34 of the Acts of 1933 is not judicial in its nature, the power to entertain it cannot be conferred upon the circuit courts by the Legislature.

Id.

⁷⁷ *Id.* at 431 (citations omitted).

[T]he broad general rule seems to be that changes which lessen the value of the contract do impair its obligations. Those that do not lessen its value do not so impair it. If gauged upon that principle, it would seem that we would be obliged to hold that chapter 34 of the Acts of the Legislature of 1933 cannot be applied retroactively, because so doing would impair the obligation of the deed of trust contract, since it is obvious that compliance with the terms of the act would of necessity to some degree lessen the value of the creditor's rights under his deed of trust.⁷⁸

The "constitutional concern" alluded to in the *Staud* case, became the basis for the court's holding in *LeSage v. Switzer*.⁷⁹ In *LeSage*, the deed of trust was executed in 1909 to secure a promissory note. Years later, in 1934, when the defendant attempted to foreclose under the deed of trust, the plaintiffs sought to enjoin the sale asserting that all rights under the deed of trust had been extinguished by the statute of limitations enacted by the West Virginia Legislature in 1921.⁸⁰

The court noted that ordinarily statutes of limitations do not extinguish substantive rights created by a contract, "but merely withdraws from the parties, after a specified period, the privilege of using the courts to enforce the contract."⁸¹ After making this point, the court explained:

After the statute has run against a debt, a creditor remains entitled to use any lawful means available for collecting his debt, which does not involve court action. If secured by a deed of

⁷⁸ *Id.* at 430 (citations omitted).

⁷⁹ 182 S.E. 797 (W. Va. 1935).

⁸⁰ *Id.* at 797. The court quotes from the 1921 statute as follows:

The part of the act of 1921 pertinent here follows: "No lien, reserved on the face of any conveyance of real estate, or lien created by any deed of trust or mortgage on real estate, shall be valid or binding as a lien on such real estate, after the expiration of twenty years from the date on which the debt or obligation secured thereby becomes due; and the provisions of this act shall apply, with like effect, to every such lien now existing, as well as to every such lien hereafter reserved or created."

As amended and re-enacted in 1931, the act provided that the limitation of twenty years should run from the original due date of the debt secured, and that no extension or renewal of the debt should enable the lien to survive the limitation.

Id.

⁸¹ *Id.* at 798.

trust, he may still have the trust enforced, since sale by the trustee (under the deed) requires no assistance from the courts.⁸²

The court in *LeSage* noted that the 1921 Act went beyond simply providing a procedural bar relating to court actions and instead altered the contractual relationships. In speaking of the 1921 Act, the court said the following:

“No lien * * * shall be valid * * * after the expiration of twenty years, * * * and the provisions of this act shall apply * * * to every such lien now existing.” Thus, instead of the limitation relating to court action on liens as other statutes had done, this act proposed to invalidate the liens themselves at the termination of the specified period. Instead of being prospective as ordinary statutes are, this act proposed to be retroactive. So far as the act is prospective only, there is no challenge. So far as it would be retroactive, it is confronted by the following inhibition of the Constitution of the United States, art. 1, § 10: “No State shall * * * pass any * * * Law impairing the Obligation of Contracts.” The act is also confronted by a like inhibition in the Constitution of West Virginia, art. 3, § 4.⁸³

The court applied the constitutionally protected “inviolability of the obligations of contracts”⁸⁴ to the facts of the case by explaining the following:

In 1909, when the instant deed of trust was executed, there was no statutory limitation on the period of its enforcement, though at that time the law would indulge a rebuttable presumption that a debt secured by a deed of trust was paid, after the expiration of twenty years. *Criss v. Criss*, supra, 28 W.Va. 388, 403, 404. The law, as it was then, entered into the proposal of plaintiffs to borrow the money as well as into the acceptance thereof by the creditor. The minds of the parties met under that law. It became a component part of the contract. The creditor is entitled to have the contract enforced according to the law of the contract. This is a fundamental rule of the common law and is recognized in West Virginia as well as by the federal authorities. “The law at the time of the contract is part of it.” A subsequent law, such as that of 1921, limiting the life of a deed of trust, would patently

⁸² *Id.* (citations omitted).

⁸³ *Id.*

⁸⁴ *Id.*

change (impair) the terms of the deed of trust herein, and therefore would violate the Constitution.⁸⁵

As part of the court's discussion of cases decided in other jurisdictions, the court observed the following: "We recognize a nice distinction between the obligation of a contract and its remedy. Where the obligation is not impaired, the remedy may be reasonably modified 'as the wisdom of the nation shall direct.'"⁸⁶

In affirming the decree of the circuit court, the court concluded by stating the following:

Consequently we are of opinion that the act of 1921 both in its original form and as amended in 1931 infringes the Constitution of the United States as well as the Constitution of West Virginia so far as the act would invalidate material lawful rights incident to a prior deed of trust.⁸⁷

The issue of the retroactive application of the 1921 Act, as amended in the Revised Official Code of 1931 was again before the court in *McClintic v. Dunbar Land Co.*⁸⁸ The facts in *McClintic* involved a suit on six notes given November 26, 1919, and secured by a vendor's lien, the note being payable one, two, three, four, five, and six years from November 26, 1919. The suit was filed late in 1943, at which time more than twenty years passed on the notes that were

⁸⁵ *Id.* at 798–99 (citations omitted).

⁸⁶ *Id.* at 799 (quoting *Sturges v. Crowninshield*, 17 U.S. 122, 200 (1819)).

⁸⁷ *Id.* at 800. The court reiterates the effect of the statute explaining the following:

Under the law effective when the deed of trust was executed (1909), the legal presumption of payment arising at the expiration of twenty years could be rebutted by satisfactory proof that the debt had not been paid. *Criss v. Criss*, supra. More than a month before the expiration of the twenty-year period following the maturity of plaintiffs' note, they conveyed to Biern & Frank, Inc., the property included in the instant trust deed (taking back from their grantee a trust deed to secure to them part of the purchase price, some of which has not been paid). As part of the consideration for the conveyance to Biern & Frank, Inc., the plaintiffs specifically required their grantee to assume the payment of their note secured by the instant deed of trust. On the day the twenty-year period would have expired, the grantee paid up all past-due interest and renewed the note (payable one year after date), following which the grantee kept the interest paid for several years. It is "well settled" that the acts of the plaintiffs and their grantee (because of its privity with them, *McClougherty v. Croft*, 43 W.Va. 270, 27 S.E. 246; *Fitzgerald v. Flanagan*, 155 Iowa, 217, 225, 226, 135 N.W. 738, Ann.Cas. 1914C, 1104) laid any presumption of payment of the debt (plaintiffs do not even advance the presumption), and in fact renewed its existence.

Id.

⁸⁸ 33 S.E.2d 593 (W. Va. 1945); see W. VA. CODE § 55-2-5 (1931).

due and payable one, two, and three years after they were made.⁸⁹ The court in *McClintic* noted that the changes made in the Revised Official Code of 1931 did not change the basic approach of the 1921 Act.⁹⁰

As it had done earlier in *LeSage*, the court noted that prior to 1921 there had been no statute of limitations on liens on real estate securing the payment of notes, but there existed a rebuttable presumption of payment after the passage of twenty years from the due date and that the purpose of the 1921 Act was to change this aspect of the law.⁹¹

The court noted that the language in the 1921 Act and section 55-2-5 after the 1931 revision, was somewhat different.⁹² Although the *LeSage* case in-

⁸⁹ *Id.* at 593–95.

⁹⁰ *Id.* at 595. *See infra*, Appendix 1. As carried into the section 55-2-5, it reads as follows:

No lien reserved on the face of any conveyance of real estate, or lien created by any trust deed or mortgage on real estate, shall be valid or binding as a lien on such real estate, after the expiration of twenty years from the date on which the original debt or obligation secured thereby becomes due, unless suit to enforce the same shall have been instituted prior to the expiration of such period; and no extension of the original time of payment of such debt or obligation, or renewal of any note or other evidence of indebtedness secured by such lien, or provision for such extension or renewal in such conveyance, trust deed or mortgage, shall operate to extend the limitation of twenty years hereinbefore provided. The provisions of this section shall apply, with like effect, to every such lien now existing, as well as to every such lien hereinafter reserved or created: *Provided, however*, That such limitation of twenty years prescribed by this section shall not be so construed as to apply to any suit or proceeding, now pending and undetermined, commenced prior to the twenty-sixth day of July, nineteen hundred and twenty-three, for the enforcement of any such lien, otherwise legally enforceable but for said limitation.

Id.

⁹¹ The court explained the rebuttable presumption of payment:

As the law was before the enactment of the 1921 statute, no statute of limitations ran against a lien secured on the face of a conveyance of real estate, or against a lien created by mortgage or deed of trust on real estate; but such a lien was presumed to be discharged on the expiration of twenty years from the date when the right to enforce the same accrued. *Camden v. Alkire*, 24 W.Va. 674, 675; *Criss v. Criss*, 28 W.Va. 388. This presumption could be rebutted by showing that the obligation secured by the lien had not been paid. The statute of 1921 was obviously intended to change the rule of law theretofore applicable to such liens, and prevent their enforcement, even though it should be made to appear that the money secured thereby had not been paid; but in doing so, it did not follow the usual form of a statute of limitations which, as a general rule, provides that no action shall be brought after the expiration of a given period, but enacted that no such lien “shall be valid or binding as a lien on such real estate after the expiration of twenty years from the date on which the debt or obligation secured thereby becomes due,” and made the same applicable to existing liens, as well so to those thereafter reserved or created.

Id. at 595–96.

⁹² *Id.* at 596.

volved a sale under a deed of trust as opposed to a suit invoking the court's assistance to enforce a vendor's lien,⁹³ the court concluded that such a distinction should not be dispositive of the case, stating the following:

This, we think, leaves the law in a rather unsatisfactory state, although the decision in question, limited as it was to trust deeds, is sound. We prefer to decide the question here raised on other and broader grounds, namely, whether the statutes in question, making a lien created by private contract invalid, do not impair the terms and effect of a contract, and, as to contracts executed prior to the effective date of the 1921 statute, void under the provisions of Article 1, Section 10 of the Constitution of the United States, and Article III, Section 4 of the Constitution of this State.⁹⁴

The court noted that contracts entered into after the passage of those statutes posed no constitutional problems.⁹⁵ However, the court said the following about security interests entered into before the Act's passage:

The title of the Act of 1921 reads: "An Act relating to liens, reserved on the faces of conveyances of real estate, or created by deeds of trust or mortgages thereon, and fixing limitations as to the period of time within which the same may be enforced"; and Code, 55-2-5, is under the general heading, "Limitation of Actions and Suits." It is apparent, we think, that as to the 1921 Act, the legislative intent was to use the statute to prevent enforcement by any means of the liens therein referred to. This intent is not so clearly apparent when we consider Code, 55-2-5, for there the limitation is, in a sense, confined to actions and suits.

Id.

⁹³ This distinction was made use of in *LeSage v. Switzer*, 182 S.E. 797 (W. Va. 1935), where it was held that the Act of 1921, as amended by and re-enacted by section 55-2-5, was unconstitutional as to a debt or obligation secured by a deed of trust, on the basic ground that the enforcement of a deed of trust did not require a suit or action in court, and that limitation of suits and actions could only be applied to situations requiring court proceedings for their settlement. There was left open, however, the question of what rule should be applied where, as in the case of a creditors' suit, the trustee and beneficiary being made parties are required to submit their rights to the court in such suit, as well as the question of whether the holding could be applied to mortgages or other liens, including deeds of trust, where in some circumstances court action for their enforcement is necessary.

⁹⁴ *McClintic*, 33 S.E.2d at 596.

⁹⁵ *Id.*

There is, of course, no question as to the constitutionality of the acts, in so far as they apply to contracts entered into subsequent to the effective date of the Act of 1921. It is unnecessary to cite the numerous authorities which uphold the right of the legislature to limit proceedings in the courts of the State, and perhaps the enforcement of liens not requiring a proceeding in court therefor, where intended to act prospectively. The settling of titles to land, the ending of disputes, and other considerations affecting the public welfare and the peace and repose of society, might be mentioned in support of such legisla-

On the other hand, those who enter into contracts do so with reference to the law as it exists at the date thereof; and any impairment by legislative action, or otherwise, of an obligation thus created, is plainly inhibited by both the State and Federal Constitutions.⁹⁶

As will be discussed below, the court's next statement is important as it relates to a possible solution to the underlying problem.

However, a mere change in the remedy for the enforcement of contract rights in the courts of the State, or otherwise, is not treated as an impairment of the obligation of a contract, so long as the person whose rights arise thereunder is given a reasonable opportunity, after the creation of such a limitation, to enforce his contract. So it is, that if the statutes in question operated only as a statute of limitation, they would not be invalid under the Constitution, because they provide a reasonable time in which persons holding liens of the nature mentioned could sue to enforce the same, after the effective date of the statute. We think, however, that in this case the statutes went farther than merely to create a procedural limitation. Each made the lien invalid. That must mean invalid for all purposes. An ordinary statute of limitation must be pleaded by the party against whom the claim is urged, otherwise it will be ignored. But a lien expressly made invalid by the Legislature has no force or effect whatever, and can never be made the basis of a decree or judgment. Under ordinary statutes of limitation, suits or actions on notes representing the money secured by a lien are at the option of the maker of the note barred at the end of the period named leaving only the lien reserved on the face of the deed to secure the notes. When that lien is declared invalid, nothing of value is left. The original right is absolutely destroyed. For this reason, we think the Act of 1921, and the subsequent Code provision, amounted to more than a procedural statute of limitation, and in so far as they operate retroactively are unconstitutional and void.⁹⁷

tion. It may be said that freedom of contract is involved; but the right to make contracts is always subject to the reasonable control of the Legislature when opposed to public policy, or where they operate against the general welfare.

See id.

⁹⁶ *Id.*

⁹⁷ *Id.* at 596–97.

While the Legislature amended section 55-2-5 in 1949 W. Va. Acts 1-2, and even though the court had held the effort to make its provisions retroactively unconstitutional in *LeSage* and *McClintic*, the 1949 amendment did not address the retroactive issue.⁹⁸

Instead, the 1949 amendment addressed the court's comment in the *McClintic* case that the 1931 revision of section 55-2-5 not only applied retroactively:

[It] further provides that there can be no extension of the time of payment of such original debt or obligation, or any renewal or other recognition of the indebtedness secured by such lien, or provision for its extension or renewal, even in the conveyance, trust deed, or mortgage by which created, the clear meaning of which is that in no possible way could the life of a lien be extended, even by a contract between the parties."⁹⁹

Though it may have been assumed that the passage of time would ultimately solve the "problem" created by unreleased security interest entered into before 1921, that assumption was soon dispelled. In *Kuhn v. Shreeve*,¹⁰⁰ the

⁹⁸ In *LeSage*, the court said, "The ordinary statute of limitation does not qualify or extinguish directly a single substantive right arising from a contract, but merely withdraws from the parties, after a specified period, the privilege of using the courts to enforce the contract." *LeSage*, 182 S.E. at 798. The 1921 Act provided the following:

"No lien * * * shall be valid * * * after the expiration of twenty years, * * * and the provisions of this act shall apply * * * to every such lien now existing." Thus, instead of the limitation relating to court action on liens as other statutes had done, this Act proposed to invalidate the liens themselves at the termination of the specified period. Instead of being prospective as ordinary statutes are, this Act proposed to be retroactive.

Id. (citing 1921 W. Va. Acts 179–80). In *McClintic v. Dunbar Land Co.*, and after noting the presumption of payment after twenty years could be rebutted by showing the debt securing the lien had not been paid, the court explained the following:

The Statute of 1921 was obviously intended to change the rule of law theretofore applicable to such liens, and prevent their enforcement, even though it should be made to appear that the money secured thereby had not been paid; but in doing so, it did not follow the usual form of a statute of limitations which, as a general rule, provides that no action shall be brought after the expiration of a given period, but enacted that no such lien "shall be valid or binding as a lien on such real estate after the expiration of twenty years from the date on which the debt or obligation secured thereby becomes due", and made the same applicable to existing liens, as well as to those thereafter reserved or created. Code 1931 makes the same general provision[.]

33 S.E.2d at 595–96.

⁹⁹ *Id.* at 596; see 1949 W. Va. Acts 1–2, *infra* Appendix 3.

¹⁰⁰ 89 S.E.2d 685 (W. Va. 1955), *overruled in part by* *Meadows v. Meadows*, 468 S.E.2d 309 (W. Va. 1996). In *Meadows*, Justice Franklin D. Cleckley discusses the application of the West Virginia Dead Man's Statute, W. VA. CODE § 57-3-1 (1937). Although *Meadows* overruled

question was the collection of an unpaid note secured by a deed of trust by selling the property under the deed of trust. The unpaid note was dated March 11, 1914 and was secured by a deed of trust of the same date. A suit was filed in 1953 to enforce the lien and to substitute a trustee for the original trustee. After concluding that the “dead man’s statute”¹⁰¹ did not preclude the admission of testimony “as to the giving of the note by T.N. Shreeve and Minnie Shreeve, who were deceased at the time the testimony was given,”¹⁰² the court discussed whether enforcement of the lien was banned by the passage of time. After noting that the statute of limitations was amended in 1949, and summarizing the *LeSage* and *McClintic* cases, the court stated that “for the purpose of this opinion, we can see no substantial difference” between the earlier wording of the statute and the statute after the 1949 amendment.¹⁰³ Applying the statute to the facts before it, the court stated the following:

The deed executed by Fletcher to Hoover bore date the 11th day of March, 1914. The deed of trust described the note secured as being for the sum of \$700 due and payable 8 months after date, so it will be seen that the original statutes discussed in the *LeSage* and *McClintic* cases were enacted after the due date of the note claimed by the plaintiff. Hence, it follows that the \$700 note here asserted by the plaintiffs is not barred by the statute, either as first enacted or reenacted by the 1949 Legislature.¹⁰⁴

After disposing of a question of whether there had been a novation when the \$700.00 note was included as part of a later note in the amount of \$1,452.00, the court concluded that the evidence supported the trial court’s determination that the note had not been paid.¹⁰⁵ Since, “the presumption of pay-

Kuhn’s holding that pertained to the Dead Man’s Statute, *Meadows* did not disturb *Kuhn’s* holding that the passage of time alone does not give rise to a laches defense. See *infra* text accompanying note 108.

¹⁰¹ 1937 W. Va. Acts 318–19.

¹⁰² *Kuhn*, 89 S.E.2d at 689.

¹⁰³ *Id.* at 691.

¹⁰⁴ *Id.* (citing *Criss v. Criss*, 28 W.Va. 388 (1886)).

¹⁰⁵ *Id.* at 692.

The defendants contend that it was erroneous for the trial chancellor to find that the debt of Shreeve to the estate of F.G. Hoover was unpaid. The fact that the \$1,452 note is in the possession of the distributees of F.G. Hoover is a strong and persuasive circumstance that the note is a subsisting obligation. Possession of a note by the payee is prima facie evidence of ownership. *Woodyard v. Sayre*, 90 W.Va. 547, 111 S.E. 313. Generally when the people pay a note, it is surrendered by the payee or holder to the maker thereof. No showing of payment is made in this record. The note was due on the 1st day of November, 1925, and so far as it appears from the record, no payment of the note or any part thereof has been made.

ment is a factual presumption and may be rebutted,”¹⁰⁶ the court held the plaintiffs successfully met their burden of rebutting the presumption. Therefore, the plaintiffs were entitled to sell the real estate under the deed of trust.¹⁰⁷ Finally, the court rejected the defendants’ assertion that the plaintiffs were barred by laches, noting that the passage of time alone does not give rise to a laches defense.¹⁰⁸ Following the *Kuhn* decision, the statute remained unchanged until 1972 when it was amended to add after the first sentence the following:

If any debt or obligation incurred or maturing subsequent to the debt or obligation secured by a lien reserved on the face of any conveyance of real estate, or lien created by any trust deed or mortgage on real estate, be also secured in whole or in part, by the same lien, such lien shall continue to be valid and binding as a lien on such real estate for a period of twenty years from the date on which such subsequent debt or obligation secured by such lien becomes due, but not thereafter¹⁰⁹

Id. at 691–92.

¹⁰⁶ *Id.* at 692.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 693.

We bear in mind the facts that the plaintiffs and Minnie Shreeve were related by blood. We are also mindful of the fact that the estate of T.N. Shreeve was insolvent and in all probability, the estate of Minnie Shreeve was in like condition. The plaintiffs say they did not want to deprive Minnie Shreeve of a home. We think that has some bearing on the delay. It may not be a legal reason, but courts in administering justice have regard to human emotions, human likes and dislikes in situations of this kind. True, the enforcement of the \$700 note which was due on the 11th day of November, 1914, has been delayed for 40 years. The note for \$1,452 was due on the 1st day of November, 1925, and enforcement thereof has not been had for 29 years. “* * * ‘Laches is a delay in the assertion of a known right which works to the disadvantage of another, or such delay as will warrant the presumption that the party has waived his right.’ * * *” *Bank of Mill Creek v. Elk Horn Coal Corp.*, 133 W.Va. 639, 655, 57 S.E.2d 736, 746; *Caplan v. Shaw*, 126 W.Va. 676, 30 S.E.2d 132; *Depue v. Miller*, 65 W.Va. 120, 64 S.E. 740, 23 L.R.A.,N.S., 775. There is no indication that the plaintiff has waived the debt in the peculiar circumstances of this case. “Delay alone does not constitute laches; it is delay which places another at a disadvantage.” Pt. 3, syllabus, *Carter v. Carter*, 107 W.Va. 394, 148 S.E. 378. But that alone does not cause an estoppel to arise in the circumstances of this case. We think the delay was excusable. We do not think the defendants have suffered any prejudice by such delay unless the deaths of T.N. Shreeve and Minnie Shreeve deprived them of the deceased’s testimony.

Id. at 693.

¹⁰⁹ 1971 W. Va. Acts 1–2; *infra* Appendix 3.

In 1997, twenty-five years after the 1972 amendment section 55-2-5 was completely rewritten and reenacted,¹¹⁰ and one year later the Act was again amended with the changes discussed below.¹¹¹

As compared to the 1997 Act, the 1998 amendment reworded section 55-2-5(b) so as to provide that an affidavit or extension notice could be executed by the secured party or beneficiary of the lien instrument alone, i.e. and that the affidavit or extension notice did not need to be executed by the grantor or mortgagor. The contents of the affidavit or extension notice is set forth in section 55-2-5(c)(1-3). However, an *amendment* to the lien instrument needs, as would be expected, to be executed by both the grantor or mortgager and the secured party or beneficiary. Wording changes were made to sections 55-2-5(b)(1) and (2) and section 55-2-5(c)(2) to reflect the changes in section 55-2-5(b).¹¹² Section 55-2-5(f) was rewritten in 1998 as the following:

Nothing in this section extinguishes any lien which was reversed or created and in effect prior to the first day of July, one thousand nine hundred ninety-eight. With respect to any lien reserved or created and in effect prior to the first day of July, one thousand nine hundred ninety-eight, the lien is valid for twenty years after its stated maturity, or if no maturity date is stated in the lien instrument, for thirty-four years after the date of the lien instrument.¹¹³

IV. THE LEGISLATURE'S DILEMMA

Given the court's opinion in *LeSage*, *McClintic*, and *Kuhn*, is it possible for the Legislature to draft a statute which would bar actions on unreleased security interest created before 1921? On the one hand, the court was suggesting a

¹¹⁰ 1997 W. Va. Acts 1366–68; *infra* Appendix 4.

¹¹¹ 1998 W. Va. Acts 1524–26; *infra* Appendix 5.

¹¹² There were several relatively minor changes in the 1998 version of the Act as compared to the 1997 version. In the 1998 Act, the words “the record instrument of” at the beginning of the first sentence of (d) in the 1997 Act was deleted. Also, subsection (e) dealing with a demand note was added to the 1998 Act, which replaced subsection (e) of the 1997 Act. Subsection (g) of the 1998 statute is essentially the same as subsection (f) of the 1997 statute, and subsection (g) of the 1997 Act is similar to subsection (f) of the 1998 Act.

¹¹³ W. VA. CODE ANN. § 55-2-5(f) (LexisNexis 1998). *See also* 1998 W. Va. Acts 1524–26. Further, subsection (e) of the 1997 Act also provided the following:

Nothing in this section extinguishes any lien obligation which was reserved or created and in effect prior to the effective date of this section: *Provided*, That if any such lien should be extinguished by this section, then any action to enforce such liens shall be brought or recordation of any extended lien obligation pursuant to subsection (b) of this section shall be made before the first day of July, one thousand nine hundred ninety eight.

See 1997 W. Va. Acts at 1368 (emphasis added).

procedural bar which would provide an affirmative defense, i.e. a statute of limitations, to a court proceeding. On the other hand, the court recognized that “enforcement” of deeds of trust did not require court involvement, and in *McClintic* the court said the rules for a vendor’s lien, which does involve a law suit, should not be different from those that applied to a deed of trust.¹¹⁴

More particularly, the court in *LeSage* said:

It seems worthwhile to preface this discussion with a brief statement of the rationale of ordinary statutes of limitations. It is hornbook law that a state may organize its judicial tribunals according to its notions of policy, and may prescribe the time within which suits shall be litigated in its courts. The ordinary statute of limitations does not qualify or extinguish directly a single substantive right arising from a contract, but merely withdraws from the parties, after a specified period, the privilege of using the courts to enforce the contract. After the statute has run against a debt, a creditor remains entitled to use any lawful means available for collecting his debt, which does not involve court action. If secured by a deed of trust, he may still have the trust enforced, since sale by the trustee (under the deed) requires no assistance from the courts.¹¹⁵

In *McClintic*, the court’s opinion states:

It is apparent, we think, that as to the 1921 Act, the legislative intent was to use the statute to prevent enforcement by any means of the liens therein referred to. This intent is not so clearly apparent when we consider Code, 55-2-5, for there the limitation is, in a sense, confined to actions and suits. This distinction was made use of in *LeSage v. Switzer*, where it was held that the Act of 1921, as amended by and re-enacted by Code, 55-2-5, was unconstitutional as to a debt or obligation secured by a deed of trust, on the basic ground that the enforcement of a deed of trust did not require a suit or action in court, and that limitation of suits and actions could only be applied to situations requiring court proceedings for their settlement. There was left open, however, the question of what rule should be applied where, as in the case of a creditors’ suit, the trustee and beneficiary being made parties are required to submit their rights to the court in such suit, as well as the question of whether the holding could be applied to mortgages or other liens, including

¹¹⁴ *McClintic v. Dunbar Land Co.*, 33 S.E.2d 593, 597 (W. Va. 1945).

¹¹⁵ *LeSage v. Switzer*, 182 S.E. 797, 797–98 (W. Va. 1935) (citations omitted) (internal quotation marks omitted).

deeds of trust, where in some circumstances court action for their enforcement is necessary. This, we think, leaves the law in a rather unsatisfactory state, although the decision in question, limited as it was to trust deeds, is sound. We prefer to decide the question here raised on other and broader grounds, namely, whether the statutes in question, making a lien created by private contract invalid, do not impair the terms and effect of a contract, and, as to contracts executed prior to the effective date of the 1921 statute, void under the provisions of Article I, Section 10 of the Constitution of the United States, and Article III, Section 4 of the Constitution of this State.¹¹⁶

The question, therefore, becomes, was the Legislature able to finesse a solution to this dilemma in its 1998 Act? The two subsections of the 1998 Act which may be relevant to security interest created before 1921 are subsection (a) and (f). If subsection (a) is designed to apply prospectively, which when read in conjunction with subsection (f) appears to be the legislative intent, then the question becomes what does subsection (f) mean? The first sentence of subsection (f) reads, “Nothing in this section extinguishes any lien which was reserved or created and in effect prior to the first day of July, one thousand nine hundred ninety-eight.”¹¹⁷ This language would appear to satisfy the court’s constitutional concerns expressed in the *LeSage* and *McClintic* decisions. However, the next sentence of subsection (f) reads:

With respect to any lien reserved or created and in effect prior to the first day of July, one thousand nine hundred ninety-eight, the lien is valid for twenty years after its stated maturity, or if no maturity date is stated in the lien instrument, for thirty-five years after the date of the lien instrument.¹¹⁸

As discussed above, the earlier versions of this Act had used the word “valid” in their attempt to bar actions on the security instrument.¹¹⁹

As to the use of the word “valid” in subsection (f) of the 1998 Act, the court’s discussion in *McClintic* raises concern. In *McClintic*, in discussing the retroactive application of the statute, the court said the following:

¹¹⁶ *McClintic*, 33 S.E.2d at 596 (citations omitted).

¹¹⁷ W. VA. CODE ANN. § 55-2-5(f) (LexisNexis Supp. 2008).

¹¹⁸ *Id.*

¹¹⁹ The offending language of the 1921 Act stated the following: “That no lien reserved on the face of any conveyance of real estate, or lien created by any deed of trust or mortgage on real estate shall be *valid* or binding as a lien on such real estate . . .” 1921 W. Va. Acts 179 (emphasis added). The same language was used each time section 55-2-5 was amended until 1997. *See* W. VA. CODE ANN. § 55-2-5 (LexisNexis 1997). *See also* 1997 W. Va. Acts 1367–68.

On the other hand, those who enter into contracts do so with reference to the law as it exists at the date thereof; and any impairment by legislative action, or otherwise, of an obligation thus created, is plainly inhibited by both the State and Federal Constitutions. However, a mere change in the remedy for the enforcement of contract rights in the courts of the State, or otherwise, is not treated as an impairment of the obligation of a contract, so long as the person whose rights arise thereunder is given a reasonable opportunity, after the creation of such a limitation, to enforce his contract. So it is, that if the statutes in question operated only as a statute of limitation, they would not be invalid under the Constitution, because they provide a reasonable time in which persons holding liens of the nature mentioned could sue to enforce the same, after the effective date of the statute. We think, however, that in this case the statutes went farther than merely to create a procedural limitation. Each made the lien invalid. That must mean invalid for all purposes. An ordinary statute of limitation must be pleaded by the party against whom the claim is urged, otherwise it will be ignored. But a lien expressly made invalid by the Legislature has no force or effect whatever, and can never be made the basis of a decree or judgment. Under ordinary statutes of limitation, suits or actions on notes representing the money secured by a lien are at the option of the maker of the note barred at the end of the period named, leaving only the lien reserved on the face of the deed to secure the notes. When that lien is declared invalid, nothing of value is left. The original right is absolutely destroyed. For this reason, we think the Act of 1921, and the subsequent Code provision, amounted to more than a procedural statute of limitation, and in so far as they operate retroactively are unconstitutional and void.¹²⁰

It would, therefore, appear that the statute's effort to make liens created before 1921 "invalid", i.e., "the lien is valid for twenty years after its stated maturity,"¹²¹ faces the same constitutional issues as the earlier reiterations of the statute have encountered.

V. DOES IT REALLY MATTER?

As discussed in an earlier law review article,¹²² a chain of title extends back to the patent or original grant from the "state" and a purchaser is charged

¹²⁰ *McClintic*, 33 S.E.2d at 596–97.

¹²¹ W. VA. CODE § 55-2-5(f) (LexisNexis 2007).

¹²² Fisher, *supra* note 6, at 451.

with constructive notice of what appears in his or her chain of title.¹²³ While it is common for most residential properties that the title search only extends back approximately sixty years,¹²⁴ the fact that the attorney only extends the title search back sixty years does not mean that “defects” before that time do not affect the title. It simply means that the attorney’s search did not discover or disclose the defects.¹²⁵

However, the recent resurgence of interest in natural gas, particularly in the Marcellus shale and coal bed methane, has significantly increased recent minerals title examinations. Because in many parts of the state “minerals” were frequently severed from the surface before 1921, the issue of unreleased security interest in real estate continues to be relevant in many title examinations. In addition, as the *Kuhn* case demonstrates, the “presumption of payment” relied upon to bar enforcement of the security interest is rebuttable.¹²⁶

From the title examiners’ point of view, it would be very helpful to be able to state in title reports that any pre-1921 unreleased security interest discovered in the chain of title in real estate are barred by a “statute of limitation.”¹²⁷

VI. A SUGGESTION FOR A SOLUTION

If the Supreme Court of Appeals of West Virginia ultimately concludes that the current language of section 55-2-5 relating to liens created before 1921 is unconstitutional, which would appear to be a good possibility based upon precedent, then the question becomes what next, if anything. It is submitted that the goal that the West Virginia Legislature has been seeking since 1921, i.e., a statutory bar to the enforcement of old (and now very old) security interest in land, is a desirable one. Title lawyers, and therefore their clients, would be well-served by being able to opine, with certainty, that very old security interest in land are barred by statute as opposed to reporting there is a rebuttable presumption that the debt has been paid.

A solution to this problem would be to incorporate a concept utilized in marketable title acts into our West Virginia statute. An overly simplified explanation of marketable title acts is to statutorily limit title examinations to a limited number of years, for example forty years. In order to preserve legal rights created more than forty years ago, such as a security interest, there must be a recording of a notice of interest of that legal right so as to place the notice of

¹²³ *Id.* at 500.

¹²⁴ *Id.* at 452; *see id.* at 474–76.

¹²⁵ *See id.* at 451–52.

¹²⁶ *Kuhn v. Shreeve*, 89 S.E.2d 685, 692–93 (W. Va. 1955).

¹²⁷ The initial statute of limitation enacted in 1921 passed April 27, 1921 and was effective ninety days from passage. 1921 W. Va. Acts 179.

interest of record within the prescribed statutory period of the title examination.¹²⁸

The concepts of requiring a re-recording of the interest utilized in marketable title acts have successfully withstood challenges as to their constitutionality. One author states, "The constitutionality of the Marketable Title Acts has been unsuccessfully challenged on grounds that they are retroactive in operation, that their operation deprives persons of their property without due process of law, and that they impair contract rights."¹²⁹ Another authority states, "The constitutionality of marketable title acts seems now to be established beyond dispute."¹³⁰

A marketable title act was introduced in the legislature in West Virginia on February 20, 1995, as House Bill 2562, and referred to the Committee on the Judiciary. House Bill 2562 was based on the Uniform Marketable Title Act.¹³¹ Given the impact the Legislature would have had on severed mineral interests, the proposed bill died in committee.¹³² However, because essentially everyone

¹²⁸ For background information on the re-recording contemplated by marketable title acts, see generally, PAUL E. BASYE, *CLEARING LAND TITLES* 368–371 (2d ed. 1970). See also LEWIS M. SIMES & CLARENCE B. TAYLOR, *THE IMPROVEMENT OF CONVEYANCING BY LEGISLATION* 3–16 (1985). The first marketable title act was adopted in Iowa in 1919, with a number of other mid-western states adopting similar acts in the 1940's. JOYCE D. PALOMAR, *PATTON AND PALOMAR ON LAND TITLES* 86–7 (3d ed. 2003). The Michigan Act, adopted in 1945, served as a model for a number of other states, and statutes similar to Michigan's were adopted during the 1960's and 70's. See *id.* at 91–94. In 1977, the Uniform Simplification of Land Transfers Act ("USLTA") promulgated by the National Conference of Commissioners on Uniform State Law included as Part 3 of the Uniform Marketable Title Act. In 1990, the Uniform Commissioners approved The Uniform Marketable Title Act as a stand alone or separate act for those states that did not wish to adopt the other provisions of USLTA. UNIF. MARKETABLE TITLE ACT (1990), available at <http://law.upenn.edu/bll/archives/ulc/fnact99/1990s/umta90.pdf>. At the present time, twenty states have some form of Marketable Title Acts. See BASYE, at 99; Jay M. Zitter, Annotation, *Construction and Effect of "Marketable Record Title" Statutes*, 31 A.L.R. 4th 11 (1984).

¹²⁹ NANCY SAINT-PAUL, *CLEARING LAND TITLES* 100 (3d ed. 2009) (citations omitted).

¹³⁰ PALOMAR, *supra* note 128, at 94. See SIMES & TAYLOR, *supra* note 128 at 253–92 (an extensive discussion of Model Legislation). *Constitutionality of Marketable Title Legislation*, 47 IOWA L. REV. 413 (1962). See also Ralph W. Aigler, *Constitutionality of Marketable Title Acts*, 50 MICH. L. REV. 185 (1951); Ralph W. Aigler, *A Supplement to "Constitutionality of Marketable Title Acts," 1951–1957*, 56 MICH. L. REV. 225 (1957).

¹³¹ See H.D. 2562, 1995 Leg., Reg. Sess. (W. Va. 1995).

¹³² The Model Marketable Title Act was drafted with provisions which would exclude mineral interest from being subject to the Act. Section 7 of the Model Act provides:

This [Act] does not bar:

- (1) a restriction the existence of which is clearly observable by physical evidence of its use;
- (2) a use or occupancy inconsistent with the marketable record title, to the extent that the use or occupancy would have been revealed by reasonable inspection or inquiry;
- (3) rights of a person in whose name the real estate or an interest therein was carried on the real property tax rolls within three years before marketability is

but the few individuals or entities that may hold very old unpaid notes secured by security interest in real estate would benefit by barring enforcement of such pre-1921 security interest, the enactment of a limited application of the marketable title act concept to pre-1921 security interest in land would seem to be a real possibility. Such a statute could provide a relatively short time period, such as two years, in which notice of pre-1921 security interests must be “re-recorded.” Failure to re-record the notice of interest within that period of time the enforcement of the security interest would be barred by statute. Given the fact that marketable title acts have successfully withstood constitutional challenges in those states that have enacted them, and given the reasoning our court articulated in *LeSage* and *McClintic*, as to why our acts are unconstitutional, it would appear that such a provision based on the marketable title acts would be upheld as constitutional in West Virginia.

VII. CONCLUSION

The problem of unreleased security interest has existed since statehood. As the early cases demonstrate, a solution relying on a “rebuttable presumption” of payment had the disadvantage of requiring court adjudication to provide certainty. The court’s analysis of the constitutionality of the early statutes, based on sound constitutional doctrine, makes it difficult to distinguish the provision of the 1998 Act. Therefore, to overrule case precedent would require the court to overrule well-reasoned earlier cases, based upon sound constitutional principles. However, instead of waiting for the next constitutional challenge to the retroactive application of the statute, the legislature could amend the statute and adopt a concept utilized in the Uniform Marketable Title Act of requiring the recording of a notice of interest of the security interest in land within a proscribed period of time following the adoption of the state. This “grace period” would allow the holder of the security interest to “protect” their right, and if they failed to “re-record” to have action on it, barred by the statute. Such a solution would be consistent with the court’s decision in *McClintic*, and the approach adopted in those states that have adopted Marketable Title Statute.

to be determined, if the relevant tax rolls are accessible to the public when marketability is to be determined; [and]

(4) a claim of the United States not subjected by federal law to the recording requirements of this State and which has not terminated under federal law [; and] [.]

[(5) oil, gas, sulphur, coal, and all other mineral interests, whether similar or dissimilar to those minerals specifically named.]

As the brackets at the end of subsection 3 and 4 indicated these were optional sections and neither of these subsections (i.e. 3 or 4) was included in House Bill 2562. UNIF. MARKETABLE TITLE ACT, *supra* note 128, 10–11.

APPENDICES

Appendix 1

Be it enacted by the Legislature of West Virginia:

Section 1. That no lien, reserved on the face of any conveyance of real estate, or lien created by any deed of trust or mortgage on real estate, shall be valid *or* binding as a lien on such real estate, after the expiration of twenty years from the date on which the debt or obligation secured thereby becomes due; and the provisions of this act shall apply, with like effect, to every such lien now existing, as well as to every such lien hereafter reserved or created. *Provided, however,* that the said limitation of twenty years prescribed by this act shall not be so construed as to apply to any suite, now pending and undetermined, or to any suit or lawful proceeding, commenced within two years from the time when this act shall go into effect, for the enforcement of any such lien, otherwise legally enforceable but for said limitation.

All acts and parts of acts, inconsistent herewith, are hereby repealed.

Passed April 27, 1921. In effect ninety days from passage.

1921 W. Va. Acts 179–80 (emphasis added).

Appendix 2

Be it enacted by the Legislature of West Virginia:

That section five, article two, chapter fifty-five of the code of West Virginia, one thousand nine hundred thirty-one, as amended and reenacted to read as follows:

Section 5. *Enforcement of Lien.*—No lien reserved on the face of any conveyance of real estate, or lien created by any trust deed or mortgage on real estate, shall be valid or binding as a lien on such real estate, after the expiration of twenty years from the date on which the original debt or obligation secured thereby becomes due, unless suit to enforce the same shall have been instituted prior to the expiration of such period; and no extension of the original time of payment of such debt or obligation, or renewal of any note or other evidence of indebtedness secured by such lien, or provision for such extension or renewal in such conveyance, trust deed or mortgage, shall operate to extend the limitation of twenty years herein before provided: *Provided, however,* That the lien reserved or created as aforesaid shall continue to be valid and be enforceable, if, prior to the expiration of the said original period of limitations, the vendor or the mortgagee or the trustee or beneficiary, or their successors or assigns, shall execute and cause to be recorded in the office where the original lien instrument was recorded an affidavit setting forth the unpaid balance of the debt and interest secured by such original lien instrument. Upon the filing of such affidavit the lien of the original instrument shall continue and be enforceable for an additional period of twenty years from the date of the filing of such affidavit unless sooner released, and the clerk of the court shall cause the extension affidavit to be recorded and indexed in the same manner as the original lien instrument and shall note the fact of filing such extension affidavit on the margin of the page where the original lien instrument is recorded. Such affidavit shall recite the book and page of recordation of the original deed, deed of trust or mortgage. The provisions of this section shall apply, with like effect, to every such lien now existing, as well as to every such lien hereafter reserved or created.

1949 W. Va. Acts 1–2.

Appendix 3

Be it enacted by the Legislature of West Virginia:

That section five, article two, chapter fifty-five of the code of West Virginia, one thousand nine hundred thirty-one, as amended and reenacted to read as follows:

ARTICLE 2. LIMITATION OF ACTIONS AND SUITS.

§55-2-5. Enforcement of certain liens.

No lien reserved on the face of any conveyance of real estate, or lien created by any trust deed or mortgage on real estate, shall be valid or binding as a lien on such real estate, after the expiration of twenty years from the date on which the debt or obligation secured thereby becomes due, unless suit to enforce the same shall have been instituted prior to the expiration of such period. If any debt or obligation incurred or maturing subsequent to the debt or obligation secured by a lien reserved on the face of any conveyance or real estate, or lien created by any trust deed or mortgage on real estate, be also secured, in whole or in part, by the same lien, such lien shall continue to be valid and binding as a lien on such real estate for a period of twenty years from the date on which such subsequent debt or obligation secured by such lien becomes due, but not thereafter unless suit to enforce the same shall have been instituted prior to the expiration of such period. No extension of the original time of payment of such debt or obligation, or renewal of any note or provision for such extension or renewal in such conveyance, trust deed or mortgage, shall operate to extend the limitation of twenty years hereinbefore provided: *Provided*, That the lien reserved or created as aforesaid shall continue to be valid and be enforceable, if, prior to the expiration of the original period of limitations, the vendor or the mortgagee or the trustee or beneficiary, or, their successors or assigns, shall execute and cause to be recorded in the office where the lien instrument was recorded an affidavit setting forth the unpaid balance of the debt and interest secured by such lien instrument. Upon the filing of such affidavit the lien of the lien instrument shall continue and be enforceable for an additional period of twenty years from the date of the filing of such affidavit unless sooner released, and the clerk of the court shall cause the extension affidavit to be recorded and indexed in the same manner as the lien instrument and shall note the fact of filing such extension affidavit on the margin of the page where such lien instrument is recorded. Such

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affidavit shall recite the book and page of recordation of the deed, deed of trust or mortgage. The provisions of this section shall apply, with like effect, to every such lien now existing, as well as to every such lien hereafter reserved or created.

1971 W. Va. Acts 1–2.

Appendix 4

Be it enacted by the Legislature of West Virginia:

That section five, article two, chapter fifty-five of the code of West Virginia, one thousand nine hundred thirty-one, as amended and reenacted to read as follows:

ARTICLE 2. LIMITATION OF ACTIONS AND SUITS.

§55-2-5. Enforcement of liens reserved by conveyance or created by deed of trust or mortgage on real estate.

(a) Any lien reserved by any conveyance of real estate or created by any deed of trust or mortgage on real estate expires after the following periods of time, unless suit to enforce the lien is instituted prior to expiration of the time period or unless the lien is extended as specified in subsections (b) or (e) of this section:

(1) If the final maturity date of the obligation is ascertainable from the record instrument, the lien expires five years after that date.

(2) If the final maturity date of the lien obligation is not ascertainable from the record instrument, the lien expires thirty-five years after the date of the lien instrument. However, if the lienholder rerecords the lien instrument prior to thirty-five years from the date of the lien and includes a copy of the obligation secured by the lien so that the final maturity is ascertainable, the lien expires five years after the date of maturity.

(b) If an affidavit or extension agreement executed by the secured party and the grantor or mortgagor to the lien obligation is recorded prior to expiration of the original period of limitation, as specified in subsection (a) of this section, the time is extended as follows:

(1) If the final maturity date of the lien obligation, as extended, secured by the lien is ascertainable from the record of the affidavit or extension agreement, the lien expires five years after the date of final maturity of the obligation, as extended.

(2) If the final maturity date of the lien obligation, as extended, secured by the lien is not ascertainable from the record of the affidavit or extension agreement, the lien expires thirty-five years after the date of the lien instrument. However, if the lienholder rerecords the lien instrument prior to thirty-five years from the date of the lien and includes a copy of the obligation secured by the lien so that the final maturity is ascertainable, the lien expires five years after the date of maturity.

(c) Any affidavit or extension agreement filed pursuant to subsection (b) of this section after the effective date of this section, shall include, but is not limited to, the following:

- (1) The unpaid balance of the debt and interest secured by the lien instrument;
- (2) The final maturity date of the obligation of the lien, as extended; and
- (3) The book and page of recordation of the original lien instrument.

The clerk of the county commission shall record and index any affidavit or extension agreement in the same manner as the original lien instrument and note that filing on the margin of the page where the original lien instrument is recorded.

(d) If the record instrument of the lien obligation shows that it secures an obligation payable in installments and the maturity date of the final installment of the obligation is ascertainable from the lien instrument, the time runs from the maturity date of the final installment.

(e) Nothing in this section extinguishes any lien obligation which was reserved or created and in effect prior to the effective date of this section. *Provided*, That if any such lien should be extinguished by this section, then any action to enforce such liens shall be brought or recordation of any extended lien obligation pursuant to subsection (b) of this section shall be made before the first day of July, one thousand and nine hundred ninety-eight.

(f) The time shall be extended only as provided in this section and shall not be extended by any other method or by operation of law.

(g) Subject to the provisions of subsection (e) of this section, the provisions of this section apply with like effect to every such lien now existing as well as to every such lien hereafter reserved or created.

1997 W. Va. Acts 1366–68.

Appendix 5

Be it enacted by the Legislature of West Virginia:

That section five, article two, chapter fifty-five of the code of West Virginia, one thousand nine hundred thirty-one, as amended and reenacted to read as follows:

ARTICLE 2. LIMITATION OF ACTIONS AND SUITS.

§55-2-5. Enforcement of liens reserved by conveyance or created by deed of trust or mortgage on real estate.

(a) Any lien reserved by any conveyance of real estate or created by any deed of trust or mortgage on real estate expires after the following periods of time, unless suit to enforce the lien is instituted prior to expiration of the time period or unless the lien is extended as specified in subsection (b) or (e) of this section.

(1) If the final maturity date of the obligation is ascertainable from the lien instrument, the lien expires five years after that date.

(2) If the final maturity date of the obligation is not ascertainable from the lien instrument, the lien expires thirty-five years after the date of the lien instrument. However, if the lienholder rerecords the lien instrument prior to thirty-five years from the date of the lien instrument and includes a copy of the obligation secured by the lien so that the final maturity is ascertainable, the lien expires five years after the date of maturity.

(b) If an affidavit or extension notice executed by the secured party or beneficiary of the lien instrument or an amendment to the lien instrument executed by the grantor or mortgagor and the secured party or beneficiary is recorded prior to expiration of the original period of limitation, as specified in subsection (a) of this section, the period of limitation is extended as follows:

(1) If the final maturity date of the obligation, as extended, secured by the lien instrument is ascertainable from the affidavit, extension notice or amendment, the lien expires five years after the date of final maturity of the obligation, as extended.

(2) If the final maturity date of the obligation, as extended, secured by the lien instrument is not ascertainable from the affidavit, extension notice or amendment, the lien expires thirty-five years after the date of the lien instrument. However, if the lienholder rerecords the lien instrument prior to thirty-five years from the date of the lien instrument and includes a copy of the obligation secured by the lien so that the final maturity is ascertainable, the lien expires five years after the date of maturity.

(c) Any affidavit, extension notice or amendment filed pursuant to subsection (b) of this section after the effective date of this section, shall include, but is not limited to, the following:

- (1) The unpaid balance of the debt and interest secured by the lien instrument;
- (2) The final maturity date of the obligation, as extended; and
- (3) The book and page of recordation of the original lien instrument.

The clerk of the county commission shall record and index any affidavit, extension notice or amendment in the same manner as the original lien instrument and shall note that filing on the margin of the page where the original lien instrument is recorded.

(d) If the lien instrument shows that it secures an obligation payable in installments and the maturity date of the final installment of the obligation is ascertainable from the lien instrument, the time runs from the maturity date of the final installment.

(e) For purposes of this section only, a lien instrument securing an obligation which is payable on demand expresses no maturity date.

(f) Nothing in this section extinguishes any lien which was reserved or created and in effect prior to the first day of July, one thousand nine hundred ninety-eight. With respect to any lien reserved or created and in effect prior to the first day of July, one thousand nine hundred ninety-eight, the lien is valid for twenty years after its stated maturity, or if no maturity date is stated in

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the lien instrument, for thirty-five years after the date of the lien instrument.

(g) The periods of limitation created by this section may be extended only as provided in this section and may not be extended by any other method or by operation of law.

1998 W. Va. 1524–26.

